Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 89–16)

FOREIGN CURRENCIES

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and other concerned pursuant to Part 159, Subpart C. Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: January 1, 1989 through March 31, 1989.

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.868000
Austria	Schilling	0.080580
Belgium	Franc	0.027034
Brazil	Cruzado	N/A
Canada	Dollar	0.839842
China, P.R.	Renimbi Yuan	0.267996
Denmark	Krone	0.146413
Finland	Markka	0.242777
France	Franc	0.165961
Germany	Deutsche Mark	0.566893
Hong Kong	Dollar	0.128074
India	Rupee	0.066578
Iran	Rial	N/A
Ireland	Pound	1.516500
Italy	Lira	0.000770
Japan	Yen	0.008091
Malaysia	Dollar	0.370508
Mexico	Peso	N/A
Netherlands	Guilder	0.502008
New Zealand	Dollar	0.635000
Norway	Krone	0.153669
Philippines	Peso	N/A
Portugal	Escudo	0.006868
Republic of South Africa	Rand	0.423729
Singapore	Dollar	0.515996
Spain	Peseta	0.008905

FOREIGN CURRENCIES—Quarterly rates of exchange January 1 through March 31, 1989 (continued):

Country	Name of currency	U.S. dollars
Sri Lanka	Rupee	$0.030248
Sweden	Krona	0.164042
Switzerland	Franc	0.667869
Thailand	Baht (Tical)	0.039667
United Kingdom	Pound	1.822500
Venezula	Bolivar	N/A

(LIQ-03-01 S:NISD CIE)

Dated: January 12, 1989.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 89-17)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER 1988

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, December 26, 1988.

Greece drachma:

December 1, 1988	$0.006940
December 2, 1988	.006925
December 5, 1988	.006969
December 6, 1988	.006961
December 7, 1988	.006791
December 8, 1988	.006908
December 9, 1988	.006906
December 12, 1988	.006897
December 13, 1988	.006863
December 14, 1988	.006911
December 15, 1988	.006913
December 16, 1988	.006885
December 19, 1988	.006835
December 20, 1988	.006761

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 1988 (continued):

Greece drachma (continued):

December 21, 1988	$0.006787
December 22, 1988	.006780
December 23, 1988	.006780
December 27, 1988	.006766
December 28, 1988	.006709
December 29, 1988	.006729
December 30, 1988	.006741

South Korea won:

December 1, 1988	$0.001450
December 2, 1988	.001451
December 5, 1988	.001452
December 6–8, 1988	.001453
December 9, 1988	.001454
December 12, 1988	.001455
December 13, 1988	.001454
December 14, 1988	.001454
December 15, 1988	.001455
December 16, 1988	.001455
December 19, 1988	.001454
December 20, 1988	.001454
December 21, 1988	.001454
December 22, 1988	.001455
December 23, 1988	.001455
December 27, 1988	.001455
December 28, 1988	.001454
December 29, 1988	.001454
December 30, 1988	.001455

Taiwan N.T. dollar:

December 1–2, 1988	$0.035474
December 5, 1988	.035486
December 6, 1988	.035474
December 7–8, 1988	.035461
December 9, 1988	.035448
December 12, 1988	.035448
December 13, 1988	.035474
December 14, 1988	.035474
December 15, 1988	.035486
December 16, 1988	.035499
December 19, 1988	.035486
December 20, 1988	.035474
December 21, 1988	.035461
December 22, 1988	.035436
December 23, 1988	.035411
December 27, 1988	.035411
December 28, 1988	.035411
December 29, 1988	.035423
December 30, 1988	.035549

(LIQ-03-01 S:NISD CIE)
Dated: January 12, 1989.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 89-18)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR DECEMBER 1988

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 88-64 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday, December 26, 1988.

Australia dollar:

December 1, 1988	$0.871500
December 2, 1988	.870800
December 5, 1988	.878600
December 6, 1988	.881500
December 7, 1988	.864000
December 8, 1988	.827500
December 9, 1988	.867700
December 12, 1988	.857300
December 13, 1988	.847100
December 14, 1988	.854700
December 15, 1988	.853800
December 16, 1988	.846500
December 19, 1988	.854000
December 20, 1988	.852000
December 21, 1988	.851500
December 22, 1988	.852000
December 23, 1988	.850500
December 27, 1988	.859000
December 28, 1988	.854500
December 29, 1988	.854500
December 30, 1988	.853500

Austria schilling:

December 1, 1988	$0.082102
December 2, 1988	.082136

FOREIGN CURRENCIES—Variances from quarterly rate for December, 1988 (continued):

Austria schilling (continued):

December 5, 1988	$0.082454
December 6, 1988	.082018
December 7, 1988	.080678
December 8, 1988	.081500
December 9, 1988	.082061
December 12, 1988	.081599
December 13, 1988	.081294
December 14, 1988	.081766
December 15, 1988	.081202
December 16, 1988	.080574
December 19, 1988	.080645
December 21, 1988	.080386
December 30, 1988	.080392

Belgium franc:

December 1, 1988	$0.027541
December 2, 1988	.027594
December 5, 1988	.027678
December 6, 1988	.027548
December 7, 1988	.027108
December 8, 1988	.027382
December 9, 1988	.027533
December 12, 1988	.027397
December 13, 1988	.027293
December 14, 1988	.027435
December 15, 1988	.027345
December 16, 1988	.027012
December 19, 1988	.027056

Denmark krone:

December 1, 1988	$0.149589
December 2, 1988	.149734
December 5, 1988	.150263
December 6, 1988	.149745
December 8, 1988	.148655
December 9, 1988	.149533
December 12, 1988	.148588
December 13, 1988	.148104
December 14, 1988	.148699
December 15, 1988	.147798

Finland markka:

December 1, 1988	$0.244200
December 2, 1988	.246853
December 5, 1988	.245278
December 6, 1988	.244798
December 7, 1988	.241400
December 8, 1988	.242895
December 9, 1988	.243843

FOREIGN CURRENCIES—Variances from quarterly rate for December 1988 (continued):

Finland markka (continued):

December 12, 1988	$0.242866
December 13, 1988	.242043
December 14, 1988	.243309
December 15, 1988	.241663
December 16, 1988	.240154
December 19, 1988	.240414
December 21, 1988	.239779
December 22, 1988	.239578
December 23, 1988	.239091
December 27, 1988	.239779
December 30, 1988	.240211

France franc:

December 1, 1988	$0.168862
December 2, 1988	.169176
December 5, 1988	.169823
December 6, 1988	.168990
December 7, 1988	.166472
December 8, 1988	.168223
December 9, 1988	.168776
December 12, 1988	.167983
December 13, 1988	.167448
December 14, 1988	.168322
December 15, 1988	.167364

Germany deutsche mark:

December 1, 1988	$0.577201
December 2, 1988	.577701
December 5, 1988	.580046
December 6, 1988	.577167
December 7, 1988	.568182
December 8, 1988	.574218
December 9, 1988	.576868
December 12, 1988	.573888
December 13, 1988	.572312
December 14, 1988	.575473
December 15, 1988	.571919
December 16, 1988	.566251
December 19, 1988	.567376

Ireland pound:

December 1, 1988	$1.546300
December 2, 1988	1.547000
December 5, 1988	1.554500
December 6, 1988	1.547000
December 7, 1988	1.512500
December 8, 1988	1.534000
December 9, 1988	1.544500

FOREIGN CURRENCIES—Variances from quarterly rate for December, 1988 (continued):

Ireland pound (continued):

December 12, 1988	$1.536000
December 13, 1988	1.531000
December 14, 1988	1.540000
December 15, 1988	1.530000
December 16, 1988	1.521000
December 19, 1988	1.514000

Italy lira:

December 1, 1988	$0.000781
December 2, 1988	.000782
December 5, 1988	.000784
December 6, 1988	.000782
December 7, 1988	.000770
December 8, 1988	.000777
December 9, 1988	.000781
December 12, 1988	.000779
December 13, 1988	.000776
December 14, 1988	.000778
December 15, 1988	.000773
December 16, 1988	.000767
December 19, 1988	.000770
December 20, 1988	.000764
December 21, 1988	.000768
December 22, 1988	.000766
December 23, 1988	.000765
December 27, 1988	.000764
December 29, 1988	.000760
December 30, 1988	.000765

Japan yen:

December 1, 1988	$0.008224
December 2, 1988	.008232
December 5, 1988	.008230
December 6, 1988	.008214
December 7, 1988	.008097
December 8, 1988	.008159
December 9, 1988	.008173
December 12, 1988	.008140
December 13, 1988	.008120
December 14, 1988	.008149
December 15, 1988	.008106
December 16, 1988	.008032
December 19, 1988	.008058
December 20, 1988	.007994
December 21, 1988	.008042
December 22, 1988	.008019
December 23, 1988	.008010

FOREIGN CURRENCIES—Variances from quarterly rate for December, 1988 (continued):

Netherlands guilder:

December 1, 1988	$0.511640
December 2, 1988	.512295
December 5, 1988	.514139
December 6, 1988	.511430
December 7, 1988	.503651
December 8, 1988	.509035
December 9, 1988	.510986
December 12, 1988	.508647
December 13, 1988	.506971
December 14, 1988	.509684
December 15, 1988	.506586
December 16, 1988	.501505
December 19, 1988	.502538

Norway krone:

December 1, 1988	$0.154083
December 2, 1988	.154297
December 5, 1988	.155376
December 6, 1988	.155111
December 8, 1988	.154321
December 9, 1988	.154967
December 12, 1988	.154679
December 13, 1988	.154048
December 14, 1988	.154321
December 15, 1988	.153894

Portugal escudo:

December 1, 1988	$0.006966
December 2, 1988	.006966
December 5, 1988	.006995
December 6, 1988	.006957
December 7, 1988	.006854
December 8, 1988	.006925
December 9, 1988	.006959
December 12, 1988	.006920
December 13, 1988	.006908
December 14, 1988	.006930
December 15, 1988	.006887

Republic of South Africa rand:

December 1, 1988	$0.437828
December 2, 1988	.439754
December 5, 1988	.441696
December 6, 1988	.438982
December 7, 1988	.423729
December 8, 1988	.426985
December 9, 1988	.426621
December 12, 1988	.424989

FOREIGN CURRENCIES—Variances from quarterly rate for December, 1988 (continued):

Republic of South Africa rand (continued):

December 13, 1988	$0.422476
December 14, 1988	.424989
December 15, 1988	.423549
December 22, 1988	.422297

Spain peseta:

December 1, 1988	$0.008848
December 2, 1988	.008850
December 5, 1988	.008899
December 6, 1988	.008857
December 7, 1988	.008696
December 8, 1988	.008850
December 9, 1988	.008887
December 12, 1988	.008813
December 13, 1988	.008794
December 14, 1988	.008853
December 15, 1988	.008811
December 16, 1988	.008768
December 19, 1988	.008786
December 20, 1988	.008715
December 21, 1988	.008764
December 22, 1988	.008749
December 23, 1988	.008734
December 27, 1988	.008740
December 28, 1988	.008692
December 29, 1988	.008722
December 30, 1988	.008826

Sweden krona:

December 1, 1988	$0.166003
December 2, 1988	.166113
December 5, 1988	.166639
December 6, 1988	.166251
December 8, 1988	.165317
December 9, 1988	.165975
December 12, 1988	.165303
December 13, 1988	.164826
December 14, 1988	.165426
December 15, 1988	.164799

Switzerland franc:

December 1, 1988	$0.688468
December 2, 1988	.689513
December 5, 1988	.692042
December 6, 1988	.688563
December 7, 1988	.676133
December 8, 1988	.682128
December 9, 1988	.684369
December 12, 1988	.682035

FOREIGN CURRENCIES—Variances from quarterly rate for December, 1988 (continued):

Switzerland franc (continued):

December 13, 1988	$0.679810
December 14, 1988	.682408
December 15, 1988	.679117
December 16, 1988	.671366
December 19, 1988	.672043
December 20, 1988	.667111
December 21, 1988	.669344
December 22, 1988	.667780
December 23, 1988	.667334
December 27, 1988	.666889

United Kingdom pound:

December 1, 1988	$1.852500
December 2, 1988	1.856000
December 5, 1988	1.870000
December 6, 1988	1.865400
December 7, 1988	1.841000
December 8, 1988	1.850000
December 9, 1988	1.849000
December 12, 1988	1.842000
December 13, 1988	1.828000
December 14, 1988	1.829500
December 15, 1988	1.827800
December 16, 1988	1.811000
December 19, 1988	1.822600
December 20, 1988	1.801500
December 21, 1988	1.807000
December 22, 1988	1.798000
December 23, 1988	1.800000
December 27, 1988	1.804000
December 28, 1988	1.789000
December 29, 1988	1.789500
December 30, 1988	1.808500

(LIQ-03-01 S:NISD CIE)

Dated: January 12, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 89–19)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued October 22, 1986 to December 23, 1987, inclusive, pursuant to Subparts A through C, inclusive, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313 (a) and (b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

Dated: January 24, 1989.
File: 221147

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Airpax Corp.
Section 1313(a) articles: Digital linear actuators; A.C. & D.C. motors; stepper motors; brushless D.C. motors; elapsed time indicators; events time indicators; stop clocks; fault isolation indicators
Section 1313(a) merchandise: Cap nuts; rotors; ball bearings; housings
Section 1313(b) articles: Digital linear actuators; A.C. & D.C. motors; stepper motors; brushless D.C. motors; elapsed time indicators; events time indicators; stop clocks; fault isolation indicators
Section 1313(b) merchandise: Cap nuts; rotors; ball bearings; housings
Factory: Cheshire, CT
Statement signed: December 8, 1986
Basis of Claim: Appearing in
Rate forwarded to RC of Customs: New York, November 12, 1987
Revokes: Unpublished authorization letter of October 28, 1987

(B) Company: Ampex Corp.
Section 1313(a) articles: Electronic equipment such as magnetic recording and reproducing devices, data storage devices, computer memories, television cameras, disk drives and controllers, computers, and electronic switching and processing equipment
Section 1313(a) merchandise: Electronic assemblies, electronic subassemblies, television camera lenses, camera pick-up tubes, core

memories, electronic cables, harnesses and other electronic devices
Section 1313(b) articles: Magnetic tapes and electronic equipment such as magnetic recording and reproducing devices, data storage devices, computer memories, television cameras, disk drives and controllers, computers, and electronic switching and processing equipment
Section 1313(b) merchandise: Electronic assemblies cables, and harnesses; printed wiring assemblies; extended board assemblies; modular assemblies; audio base film; iron oxide; and magnetic tape cassette parts, chemicals, or coatings; identified by part number
Factories: Opelika, AL; Redwood City (2), El Segundo & Sunnyvale (5), CA; Colorado Springs & Wheat Ridge, CO
Statement signed: December 19, 1986
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), August 18, 1987
Revokes: T.D. 85–75–A

(C) Company: Carol Cable Co., Inc.
Section 1313(a) articles: Copper wire insulated
Section 1313(a) merchandise: Copper rod
Section 1313(b) articles: Copper wire insulated
Section 1313(b) merchandise: Copper wire
Factories: Lincoln, RI; River Grove, IL; Rancho Dominguez, CA; Manchester, NH; New Bedford, MA
Statement signed: September 3, 1986
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: Boston, November 18, 1986

(D) Company: CIBA-GEIGY Corp.
Section 1313(a) articles: Irganox 1076; tinuvin 328; tinuvin P
Section 1313(a) merchandise: Stearyl alcohol; 2,4-ditertiary amyl phonol; isopropyl alcohol; paracresol
Section 1313(b) articles: Irganox 1076; tinuvin 328; tinuvin P; tinopal PT liquid
Section 1313(b) merchandise: Stearyl alcohol; 2,4-ditertiary amyl phenol; isopropyl alcohol; paracresol; sulfanilic acid
Factories: McIntosh, AL; Toms River, NJ; Cranston, RI
Statement signed: March 20, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, October 22, 1986
Revokes: T.D. 84–172–C

(E) Company: Commodore Business Machines, Inc.
Section 1313(a) articles: Personal computers

Section 1313(a) merchandise: Keyboards; printed circuit boards; power supplies
Section 1313(b) articles: Personal computers
Section 1313(b) merchandise: Keyboards; printed circuit boards; power supplies
Factory: West Chester, PA
Statement signed: March 9, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, December 23, 1987
Revokes: T.D. 86–127–C

(F) Company: FMC Corp., Agricultural Chemical Group
Section 1313(a) articles: 7-hydroxy benzofuran (7-OH)
Section 1313(a) merchandise: Catechol
Section 1313(b) articles: 7-hydroxy benzofuran (7-OH); carbofuran technical; carbofuran insecticides; carbosulfan technical; carbosulfan formulated insecticides
Section 1313(b) merchandise: Ortho nitro phenol (ONP); triethylamine (TEA); 7-hydroxy benzofuran (7-OH); carbofuran technical; di-n-butylamine
Factories: Baltimore, MD; Opelousas, LA; Fresno, CA; Malaga, NJ; Sergeant Bluff, IA; Middleport, NY; Jacksonville, FL; Wyoming, IL; St. Albans, WV
Statement signed: May 11, 1987
Basis of Claim: Used in
Rate forwarded to RC of Customs: New York, July 27, 1987
Revokes: T.D. 85–165–H

(G) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Nylon yarn, textured
Section 1313(a) merchandise: 70 denier continuous filament nylon yarn, not textured
Section 1313(b) articles: Nylon yarn, textured
Section 1313(b) merchandise: 70 denier continuous filament nylon yarn, not textured
Factories: Altamahaw & Norlina, NC
Statement signed: September 23, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, January 27, 1987

(H) Company: Intel Corp.
Section 1313(a) articles: Partially fabricated integrated circuits in die and wafer form; finished integrated circuits and semiconductor devices; finished systems and related equipment
Section 1313(a) merchandise: High purity silicon wafers; packages; frames; lids; unfinished integrated circuits and semiconductor devices; finished integrated circuits and semiconductor devices

Section 1313(b) articles: Partially fabricated integrated circuits in die and wafer form; finished integrated circuits and semiconductor devices; finished systems and related equipment
Section 1313(b) merchandise: High purity silicon wafers; packages; frames; lids; unfinished integrated circuits and semiconductor devices; finished integrated circuits and semiconductor devices
Factories: Phoenix & Chandler, AZ; Santa Clara, Livermore & Folsom, CA; Rio Rancho, NM; Aloha, Beaverton & Hillsboro, OR
Statement signed: August 14, 1986
Basis of claim: Used in, less valuable waste
Rate issued by RC of Customs in accordance with § 191.25(b)(2): San Francisco, October 24, 1986
Revokes: T.D. 81–301–Q to cover changes in factory locations

(I) Company: Monsanto Co.
Section 1313(a) articles: Fortress® granular herbicide
Section 1313(a) merchandise: 2,6-dinitro-N-N-di-n-Propyl-α,α,α, -Trifluoro-p-Toluidine (a/k/a Trifluralin technical)
Section 1313(b) articles: Fortress® granular herbicide
Section 1313(b) merchandise: 2,3,3-Trichloroallyl diisopropyl-thiocarbamate (a/k/a TDTC or Avadex® BW technical)
Factory: Muscatine, IA
Statement signed: August 1, 1986
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: Chicago & New York, December 22, 1986

U. O. P. Inc., Norplex Division operating under T.D. 81–301–Y has changed its name to Norplex/Oak, Inc.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 162

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE LIABILITY OF COMMON CARRIERS FOR FAILURE TO EXERCISE THE HIGHEST DEGREE OF CARE AND DILIGENCE TO PREVENT UNMANIFESTED NARCOTICS AND MARIJUANA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes amendments to the Customs Regulations relating to the liability of common carriers to penalties, seizure and forfeiture for unmanifested narcotic drugs or marijuana. The proposed changes would add to the regulations the statutory standard for the highest degree of care and diligence on the part of common carriers in preventing unmanifested drugs and marijuana. The changes further set forth specific duties and procedures by which the standard is defined and against which compliance with the standard can be determined. These duties and procedures include such security measures as background investigations of employees, access restrictions to cargo areas, use of lighting in storage areas, and other similar measures.

DATE: Comments must be received on or before April 3, 1989.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, Room 2324, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Penalties Branch, Office of Regulations and Rulings, U.S. Customs Service (202) 566–5746.

SUPPLEMENTARY INFORMATION:

Under 19 U.S.C. 1584(b) penalties are authorized for unmanifested narcotic and controlled drugs and marijuana found on vessels, vehicles and aircraft unless the master or person in charge could not have known by the exercise of the "highest degree of care and

diligence" of the presence of such merchandise. Section 3124 of the Anti-Drug Abuse Act of 1986 (Pub. L. 99–570) extended the highest-degree-of-care-and-diligence standard to apply in connection with seizures and forfeitures of aircraft and other common carriers resulting from unmanifested narcotic drugs or marijuana in amendments to 19 U.S.C. 1594. In Senate Report No. 100–160, 100th Congress, 1st Session (September 17, 1987), the Senate Committee on Appropriations noted that there was no definition of the highest-degree-of-care-and-diligence standard by which an airline can measure whether its precautions have satisfied the standard of care prescribed by statute. It was further indicated that the Customs Service should attempt to define the standard by specifying procedures and specific duties for airlines to follow.

The proposed changes would add the standard to the regulations and include specific duties and procedures against which compliance with the standard can be determined. These duties and procedures include such security measures as background investigations of employees, access restrictions to cargo areas, use of lighting in storage areas, and similar measures. The requirements are made equally applicable to sea and vehicular carriers as well as to air carriers, and are applicable with respect to seizures and forfeitures as well as penalties.

Section 162.65, Customs Regulations (19 CFR 162.65) relates to penalties under 19 U.S.C. 1584(b) for failure to manifest narcotic drugs and marijuana. Inclusion of the highest-degree-of-care-and-diligence standard and the specific duties and procedures under which that standard may be defined and against which compliance may be determined are proposed to be set forth as amendments to section 162.65. It is further proposed to add a new section 162.67 to make the standard applicable to seizures and forfeitures under 19 U.S.C. 1595a and the definition for the standard applicable to 19 U.S.C. 1594(c).

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted to the Customs Service. Commenters are requested to address the clarity of the guidelines on security measures, the ability of common carriers to apply them in a standardized manner, other factors that should be taken into account, and the relative importance of individual factors. Submitted comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. And 4:30 p.m. At the Regulations and Disclosure Law Branch, Room 2324, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), It is certified that the regulation amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

These amendments do not provide for a collection of information as defined by 5 CFR 1320.7(c), and, therefore, the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(b)) are not applicable.

DRAFTING INFORMATION

The principal author of this document was James C. Hill, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 162

Customs duties and inspection, Law enforcement, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures.

PROPOSED AMENDMENTS

It is proposed to amend Part 162, Customs Regulations, as set forth below:

PART 162—RECORDKEEPING, INSPECTIONS, SEARCH AND SEIZURE

1. The general authority citation for Part 162 is amended by the addition of further specific authority for § 162.65 and § 162.67 in proper numerical sequence as follows:

Authority: * * *

§ 162.65 also issued under 19 U.S.C. 1584, 1594, 21 U.S.C. 960, 961;
§ 162.67 also issued under 19 U.S.C. 1594, 1595a;

2. It is proposed to amend section 162.65 by redesignating paragraphs (c) through (e) as paragraphs (e) through (g) respectively.

3. It is proposed to further amend section 162.65 by inserting new paragraphs (c) and (d) to read as follows:

§ 162.65 Penalties for failure to manifest narcotic drugs or marijuana.

* * * * * * *

(c) *Liability of common carriers.* Common carriers are liable for the payment of penalties prescribed in 19 U.S.C. 1584 for failure to manifest narcotic drugs or marijuana unless the master or other person in charge of the conveyance, or the officers, or the owner of the conveyance can establish that they did not know and could not have known, by the exercise of the highest degree of care and diligence, that narcotic drugs were on board.

(d) *Highest degree of care and diligence.* The burden of proving that it has exercised the highest degree of care and diligence is on the common carrier. The determination as to whether or not a common carrier has carried this burden of proof will be made by Customs on a case-by-case basis. It will reflect the individual facts and circumstances, and will take into account measures taken at the foreign lading location, on board the conveyance while en route, and upon arrival in the United States. Depending on the particular facts and circumstances surrounding a carrier's failure to manifest narcotic drugs or marijuana, that carrier must submit evidence that it performed security measures such as, but not limited to, the following:

(1) Investigating background of each employee to determine whether the employee has engaged in criminal activities, activities related to narcotics smuggling, or has a standard of living which is inconsistent with the salary being paid by the carrier.

(2) Knowing identities of representatives of companies delivering merchandise to the foreign port of lading for shipment, and identities of company employees receiving cargo at the foreign port of lading. Special attention should be paid to first-time and infrequent shippers.

(3) Maintenance of a secure facility, including locking of doors and windows and maintenance of a secure perimeter.

(4) Restricting access to the cargo area to authorized personnel only, by use of such measures as uniforms, badges, or a card key system.

(5) Maintenance of 24-hour security by use of guard details and/or an alarm system to alert officials in the event the perimeter is violated when the facility is closed.

(6) Maintenance of adequate lighting in work areas and storage facilities.

(7) Maintenance of inventory control including serially numbered bills of lading and control of seals.

(8) Routine inspection of the facility or conveyance by management and security personnel, and the taking of appropriate action on the basis of observed deficiencies.

(9) Operation of a program to insure that narcotic drugs and marijuana are not concealed in the conveyance, e.g., sealing or securing compartments within a conveyance, such as rope lockers, chain lockers, or compartments within the lavatory, where this will not affect safety or operation of the conveyance.

(10) Prompt disclosure to Customs and other law enforcement officials of information which would lead directly or indirectly to the detection of narcotics.

(11) Operation of a program designed to insure that all packages and containers are manifested and that the marks, numbers, weights and quantities on the packages and containers agree with the manifest.

4. It is proposed to amend Part 162 by adding a new section 162.67 to read as follows:

§ 162.67 Seizures of common carriers.

For the purpose of seizure and forfeiture of a common carrier pursuant to 19 U.S.C. 1595a(a) as a result of the carrying of unmanifested narcotic drugs, controlled substances, or marijuana, or assisting in the carrying of such merchandise, the common carrier will be held to the same standard of the highest degree of care and diligence required under section 1594(c). The definition for that standard in § 162.65(d) of this part shall apply under either provision.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: October 5, 1988
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, January 31, 1989 (54 FR 4835)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

*Judges**

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

*Judge Paul P. Rao passed away on November 30, 1988.

Decisions of the United States Court of International Trade

(Slip Op. 88–170)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–04–00627

[Remanded.]

(Decided December 27, 1988)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.,* and *Jimmie V. Reyna*), for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This is one of several actions challenging International Trade Administration (ITA) determinations rendered as a result of a petition filed by plaintiff concerning fresh cut flowers from eight countries. This particular case involves antidumping duties with regard to miniature and standard carnations and pompon and standard chrysanthemums from Ecuador. The final determination at issue resulted in findings of weighted average dumping margins for various producers of between 2 and 19 percent. *Certain Fresh Cut Flowers From Ecuador,* 52 Fed. Reg. 2,128 (Jan. 20, 1987), as amended 52 Fed. Reg. 8,494 (Mar. 18, 1987).

Plaintiff takes issue with the adequacy of the investigation, and the methodology used, as well as with certain decisions made with regard to calculation of foreign market value derived from cost of production data.

I. FAILURE TO CONDUCT A BELOW COST OF PRODUCTION INVESTIGATION

Plaintiff's first claim is that defendant failed to fulfill its statutory duty to conduct a less than cost of production investigation. In its determination, ITA stated that the request to conduct such an investigation one month in advance of the final determination was untimely and would be denied on that basis.

Section 773(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (1982) provides:

(b) Sales at less than cost of production.

> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—
>
> > (1) have been made over an extended period of time and in substantial quantities, and
> >
> > (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,
>
> such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made are not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

In this case, plaintiff did not specifically request ITA to perform a less than cost of production analysis at the time it filed its petition. Apparently, at that time, plaintiff did not possess data which it believed would constitute "reasonable grounds to believe or suspect" that such an investigation should be undertaken. *See* 19 U.S.C. § 1677b(b) (1982). Defendant does not dispute this, but avers that by the end of October plaintiff knew everything it knew on December 12 when plaintiff actually requested such an investigation and that clearly one month is too short a time in which to conduct an investigation. (Plaintiff does not appear to disagree with defendant's assertion that one month is an insufficient amount of time to conduct a cost of production investigation.) It is unclear whether ITA would have acceded to plaintiff's request had it made it one month or six weeks earlier, but plaintiff offers no acceptable reason for not immediately alerting ITA as soon as it possessed information it contends indicates that a less than cost of production investigation was necessary.

The argument plaintiff makes here is that ITA had reasonable grounds to suspect that the investigation was needed as early as September and that under the statute it had a duty to perform the investigation without waiting for a request from plaintiff. It is well accepted that ITA's duties are largely investigatory,[1] but given the burdens placed upon ITA by the statute it is not reasonable to ex-

[1] *Timken Co.* v. *United States*, 10 CIT 86, 92, 630 F. Supp. 1327, 1333 (1986), *see Connors Steel Corp.* v. *United States*, 2 CIT 242, 527 F. Supp. 350 (1981), *modified*, 3 CIT 79, 566 F. Supp. 1521 (1982).

pect ITA in every case to pursue all investigative avenues, even such important areas as less than cost of production sales, without some direction by petitioners. It should be remembered that cost of production need not be investigated in every case, but only when reasonable grounds are present. Part of whether ITA has "reasonable grounds to believe or suspect" that a less than cost of production analysis is needed is whether it has been requested. *See Floral Trade Council* v. *United States*, Slip Op. 88–144 (October 24, 1988) (Review of ITA final determination as to fresh cut flowers from Costa Rica).

Plaintiff argues further that even if it has some duty to act, it was obvious from the record that home market sales were being made at less than cost of production, and therefore there was no need for such a request. The court finds that the need for the investigation was not as obvious as plaintiff claims it to be.

In its petition, plaintiff gave cost of production figures based on costs in the United States, but said nothing about the need for a below cost of production investigation. Available to ITA was some information on cost of production for Columbia. At least one source indicated that production conditions in Ecuador were only slightly different from those in Columbia. By mid-September, ITA also had home market price data from some Ecuadorian producers. Those figures indicated that Ecuadorian sales data available to ITA were at values less than the non-Ecuadorian cost of production. In mid-September, however, ITA had not determined what adjustments to petitioner's cost of production figures should be made to make them appropriate to Ecuador. By the end of October, ITA had arrived at a proxy production cost figure for Ecuador based on "best information available." Thus, by the end of October ITA had some information available to it from which it might have concluded that sales in Ecuador might have been at less than the cost of production. Nonetheless, ITA was not required to conclude *sua sponte* that cost of production in Ecuador, in reality, would approximate the proxy figure, which would be the basis of any suspicion of less than cost sales. The best information available rule allows the agency to use values which may have little to do with reality. The information used as best information available may form the basis of a reasonable suspicion, under circumstances, that less than cost of production sales are occurring. It does not necessarily follow from this that the need for the investigation was facially apparent here.[2]

The court finds that given ITA's need to synthesize data and to draw various conclusions from evidence not directly applicable to the home market in order to arrive at any opinion as to whether a below cost of production investigation should be undertaken, the need for the investigation cannot be described as obvious. Due to

[2]The court does not reach defendant's argument that, as a matter of law, this type of data cannot form a reasonable basis to suspect less than cost of production sales. Defendant cites *Al Tech Specialty Steel Corp.* v. *United States*, 6 CIT 245, 575 F. Supp. 1277 (1983), *aff'd on other grounds*, 745 F.2d 632 (Fed. Cir. 1984) in support of this argument. Here, ITA made no decision on this issue.

the late development of the relevant information, plaintiff was under an obligation to notify ITA as soon as possible of its belief that such an investigation was needed and the reason for its belief. Under the circumstances of this case, ITA was not unreasonable in declining to conduct a less than below cost investigation requested one month prior to the issuance of the final determination.[3]

II. Use of Monthly Averaging for U.S. Price Purposes

The next issue raised by plaintiff is whether the use of monthly averages calculate United States price unreasonably obscures dumping during low demand periods.

Pursuant to the Trade and Tariff Act of 1984, Pub. L. No. 98–573, Title VI, § 620, 98 Stat. 3039, the antidumping law was amended to expressly permit use of averaging in the determination of U.S. price. 19 U.S.C. § 1677f–1 (Supp. IV. 1986) now reads:

§ 1677f–1. Sampling and averaging.

(a) In general.

> For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may—
>
> > (1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and
> >
> > (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

(b) Selection of samples and averages.

> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

Thus, although averaging may be used under the circumstances described in subsection (a), it may not be utilized in a manner that produces results which are "unrepresentative." 19 U.S.C. § 1677f–1(b). The purpose of the amendment was to ease ITA's burdens. H.R. Rep. No. 725, 98th Cong., 2d Sess. 45–46 (1984). An interpretation of the statute which furthers that goal and is still within the strictures of the statute will be sustained.

The first question to be addressed in this case is whether subsection (a) of the statutes is satisfied. The proceeding under review was initiated by simultaneous petitions by this plaintiff covering over

[3] Although plaintiff's delay was only six weeks, in the context of the short time frames provided by the statute, it was a serious delay.

260,000 sales transactions, although the Ecuadorian sales subject to investigation totaled only several hundred. Nonetheless, investigation of the hundreds of thousands of related sales proceeded at the same time, subject to the same strict statutory time limits. The court accepts ITA's view, evidenced in the determination, that when ITA is conducting a number of investigations simultaneously as a result of petitions by one party relating to the same product class, it may determine whether a "significant volume of sales" or number of adjustments are involved, on the basis of all of the transactions involved in the related investigations. Thus, in this case,[4] some type of averaging, that was also "representative," was permitted by the statute.[5]

The next question to be addressed is whether the particular form of averaging selected by ITA results in margins which are "unrepresentative" under subsection (b) of the statute. Plaintiff argues that the legislative history indicates that representativeness should be judged on what the results would be absent averaging. H.R. Rep. No. 725, 98th Cong., 2d Sess. 46, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5127, 5173 states that averaging should not produce a "loss of reasonable fairness in the results." Plaintiff also cites the statement of the Deputy Assistant Secretary for Import Administration: "[t]here will be some minor effects, and I am not sure which way they go to be honest. I would give up some of the thousandths, or hundreds, or even tenths of percentage points for just getting rid of that enormous quantity of work." *Option to Improve the Trade Remedy Laws,* Hearing before the Subcomm. on Trade, Comm. of the House Ways and Means Committee, 98th Cong., 1st Sess., Serial 98–15 at 560 (1983).

First, this type of somewhat ambiguous "off the cuff" statement at a hearing would seem to be relatively weak evidence of Congress' intent with regard to the statute finally enacted, especially in view of other more formal statements of purpose. Second, averaging would not be an effective work saving device (which is the reason emphasized by the quoted proponent), if ITA must calculate a result based on transaction by transaction analysis in order to determine whether averaging is permissible.

Third, what the result would have been had the case arisen before 1984 is not clear. Prior to 1984, ITA did use sampling to establish U.S. price, *see Fresh Winter Vegetables from Mexico,* 45 Fed. Reg. 20,512, 20,515 (1980) (Final Determination of Sales at not LTFV), and averaging was not expressly forbidden by the statute. In fact, in *Winter Vegetables* at least some conclusions as to U.S. price were based on averaged data. 45 Fed. Reg. at 20,516. In addi-

[4]For the purpose of the case the court will assume little difficulty in the related cases with utilization of computer tapes for most of the 260,000 transactions. Congress may be presumed to have been aware of the possibility of computerization when it permitted averaging in cases involving significant numbers of transactions with only the qualification of representativeness.

[5]In sanctioning cumulative analysis of imports from various countries in certain International Trade Commission investigations, Congress recognized the interrelatedness of certain unfair trade cases. ITA should be permitted to adjust to problems arising from similar considerations.

tion, the regression analysis employed in that case did not treat U.S. prices in ITA's "traditional" manner.[6] *Id.* Therefore, although it is difficult to say exactly what the pre-1984 result would have been, averaging and other non-traditional treatments of U.S. prices were not unknown in pre-1984 ITA determinations.

As in *Winter Vegetables,* perishability and resulting price fluctuation is one of the reasons for employing a non-traditional methodology such as sampling or averaging. It is clear that flowers, which only remain saleable at full price for several days at the outside, are perishable. Averaging of prices on a daily or weekly basis would be one reasonable means of avoiding penalizing producers for normal selling practices necessitated by the rapid deterioration of the merchandise at issue. Averaging on such a short-term basis prevents ordinary course of business "end-of-life" sales prices from producing unreasonably high margins not reflective of actual overall dumping patterns. In a case such as this, transaction by transaction analysis may distort the margin because of ITA's consistent practice in transaction by transaction analysis of counting above fair value sales as being at fair value.[7] As ITA stated, "a producer whose normal sales are at prices above fair value could be found to be dumping solely because of these end of the day transactions." 52 Fed. Reg. at 2,129. If ITA did not employ some averaging in this case, it would have had to adopt other methods to account for the perishability factor in order for the U.S. price data to be "representative" of reality.

As ITA averaged not on a daily or weekly basis, which would account for the perishability problem, but on a monthly basis, the court believes further explanation of the reason for monthly averaging should be discernible if the decision is to be sustained. One reason put forth by ITA is that consignees in the United States reported sales to producers on a monthly basis, "[f]or exporters in some countries the only information available on United States sales is monthly totals." 52 Fed. Reg. at 2,129–30. This circumstance, however, does not prevent ITA from requesting specific transaction information or weekly average rates and, in appropriate circumstances, from using information less favorable to the respondent, if the requested information is not provided.[8] The statutory scheme, however, favors actual price data, if it can be used in a manner consistent with other provisions of the statute. Thus, the availability of monthly data is one factor which ITA may consider in determining the period it will use for averaging. Other factors were also considered.

Flower prices rise and fall over an entire year because flower prices rise prior to holidays. Accordingly, production is geared to

[6] *See infra* discussion and note 7.

[7] This practice was approved under other circumstances in *Serampore Indus.* v. *United States,* 11 CIT ——, 675 F. Supp. 1354 (1987).

[8] Whether data could have been obtained directly from importers on a transaction by transaction basis does not seem relevant as ITA would not have been able to conduct verifications at multiple importer locations.

such times. At other times volume and prices fall. To account for this pattern of production and pricing, ITA doubled the normal period of its investigations to cover one entire year's cycle. This doubling of the cycle, for the most part, benefitted plaintiff because it brought the summer and fall months of lower U.S. flower prices into the investigation. Most spring and winter months are high price times in the United States because of Christmas, Valentine's Day, Easter and Mother's Day. ITA considered each month separately so that high sales prices in spring and winter months would not mask dumping during the summer and fall months. Plaintiff argues that monthly averaging is too broad and that high prices at the beginning of May, for example, will obscure low month end prices. Plaintiff further argues that sales to customers targeted for low prices will be obscured. Plaintiff, however, has not demonstrated by citation to evidence of record that any significant obscuring of dumping occurs when monthly as opposed to weekly averaging is used.[9] In contrast, respondents claimed that monthly averaging exaggerated dumping because the home market holiday schedule differs somewhat from that in the United States, and that averaging over three or six months would better reflect the reality of a normal sales pattern. *See* 52 Fed. Reg. at 2132 (Respondent's Comment 4). Thus, neither side though that monthly averaging would result in an appropriate representation. One side thought it was too broad, one side thought it was too narrow.

In order to take a consistent approach utilizing readily available real data reported to respondents by consignees, to lessen the potential for prejudice to respondents while attending to plaintiff's request, and to ease its overall burdens so as to complete processing of plaintiff's petition according to statutory time periods, ITA used monthly averages. Under these circumstances and absent specific evidence that this form of averaging resulted in margins which are not representative, the court cannot find a conflict with the statute. It is not necessary to nearly duplicate pre-1984 results (whatever they may be) in order to utilize averaging; nor is it necessary to check the results in every case by using a regression analysis of the type employed in *Winter Vegetables.*[10] There may be better ways to conduct an investigation as to perishable merchandise, but if so, such a fact would not be determinative. The court does not find ITA's particular methodology unreasonable in the context of an industry which operates on predictable (but different foreign and U.S.) yearly cycles of rising and falling prices and includes regular low price sales of deteriorating merchandise. Use of averaging here produced representative results.

[9] Plaintiff gives examples of higher margin calculations if traditional transaction by transaction data is used. As indicated, in this case such a methodology would not be reasonable.

[10] *Winter Vegetables* did not involve a fluctuating full yearly cycle and the regression analysis was used to check a negative result. The result here was affirmative.

III. Cost of Production for Eden Flowers

ITA used best information available to construct a foreign market value for Eden Flowers, because Eden Flowers did not respond properly to ITA's questionnaire. ITA used much of the U.S. based cost of production data provided by plaintiff in order to arrive at a constructed value. It made some adjustments to account for different practices in the home market and otherwise, to which Floral Trade objects.

A. Interest expenses.

First, ITA reclassified interest expenses to the general expenses category. Classifying interest expenses as materials and fabrication costs would increase the base figure upon which floors for general expenses and profit are based. *See* 19 U.S.C. § 1677b(e)(1) (1982 & Supp. IV 1986). Defendant argues that interest expenses attributable to general working capital loans ordinarily would be used for entire business operations and not just for production or fabrication. As such, they would be normally considered by ITA to be general expenses which are computed separately from the cost of materials and fabrication.[11]

Plaintiff argues that, due to the seasonal nature of production, interest expenses relate directly to production. ITA has stated in several of its flower determinations, including this one and *Certain Fresh Cut Flowers from Colombia,* 52 Fed. Reg. 6842, 6845 (1987), that interest expenses for working capital are general expenses. This also comports with Ecuadorian accounting practice. ITA's classification of working capital interest expenses is reasonable.

B. Officers' salary expenses.

Plaintiff's next argument is that "officers' salary" expenses should not have been moved to the general expense category. ITA does not dispute that in the United States, growers perform direct production functions, including labor. Defendant states that because evidence was submitted indicating that this was not the practice in Ecuador, ITA moved the officers' salary expenses figure (based on U.S. production costs) to the general expenses category. This, of course, lowered the base "materials and fabrication" figure and ITA merely added the ten percent minimum general expense figure required by statute. 19 U.S.C. § 1677b(e)(1)(B). With regard to this adjustment, defendant seems to argue that it may make less than fully logical adjustments because it is proceeding on best information available. The court believes that ITA must always act reasonably in using best information available, and that it may not employ this principle to benefit a party who did not cooperate fully, to the detriment of petitioner.[12]

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[11] ITA recognizes an exception for discrete manufacturing projects extending over time. 52 Fed. Reg. 2,130.

[12] The best information available rule is found at 19 U.S.C. § 1677e (1982 and Supp. IV 1986).

Had ITA based its calculation of cost of production on Ecuadorian base figures, there would be a basis for its action. As defendant's original brief indicated, its arguments on this issue stem largely from the data about Ecuadorian companies who provided data. Eden flowers is in a different category; its cost data is based on that of U.S. producers, as adjusted. If one is using U.S. cost data as a base, as appears to be the case here, one must decide how much of cost in the United States relates to production and then such cost may be adjusted where appropriate for differing labor rates in the foreign country.[13] The reasons expressed by ITA fail to take into account the fact that if officers in Ecuador do not work in production, they presumably must hire someone to perform production tasks similar to those performed by growers in the United States. Any adjustments made to the U.S. cost figures must take into account the framework of the base cost data.

The record contains an indication that some percentage of the U.S. owner salary figure may be allocable to labor. *See* Confidential Record Document Number 4 at 621A.[14] Plaintiff suggests a methodology in which ITA could strip out owners' salaries from production costs, and then add the amount of labor necessary to replace that performed by the U.S. owners, perhaps by referring to the salaries paid in Ecuador to the managers on Ecuadorian flower farms. ITA may employ any reasonable method which accounts for full labor costs. Its current methodology, which does not account for such costs, unreasonably favors the non-fully complying respondent.

C. Agronomist salary expense.

Next, Floral Trade Council argues that agronomists' salaries should not be treated as general expenses because they are direct production costs. Because Florisol, the only producer whose cost data was verified and is also known to use an agronomist, produced flower and non-flower products, ITC did not treat agronomy costs as directly related to flower production. This is not a logical explanation of the treatment of agronomy costs because it does not address whether the work of agronomists is related to basic production or not. If agronomists' salaries are basic production costs, the Florisol figures could be allocated between flower production and other production. If agronomy expenses are production costs but they are performed by owners in the United States, as is indicated by some information, then a proper adjustment for owner salaries will also properly account for this cost. If agronomy costs are in addition to the type of tasks performed by U.S. growers and laborers and are

[13]The explanation at page 34 of document 1 of the administrative record indicates that the labor costs listed on p. 35 thereof were adjusted by applying a different wage rate. The Colombian labor cost figure, which was used as a proxy for Ecuadorian labor cost, is not based on the average number of laborers actually utilized for flower production in Colombia. The figure is simply a fraction of the U.S. cost.

[14]ITA has also not made clear how it treats supervisory labor. Generally, supervisory labor and other costs such as equipment depreciation are considered factory overhead. W. Morse & H. Roth, *Cost Accounting* 29 (3rd ed. 1986). The court is unclear, as to whether all factory overhead is considered a basic production cost by ITA or not. This would also affect the percentage of the owners' salary figure to be allocated. Some explanation by ITA of how it draws the line between basic production costs and general expenses, both in general terms and as to the flower industry, would be useful.

also production costs, they should be added to the "fabrication" cost figures. The explanation provided by ITA related to Florisol is not adequate to support its decision.

This matter is remanded for reconsideration by ITA of its treatment of officers' salary expenses and of agronomists' salaries and further for explanation of each of these decisions related to standards for calculating cost of production. ITA shall file its remand determination in 30 days. Plaintiff shall confer with opposing counsel and submit a briefing schedule within 10 days thereafter.

(Slip Op. 88–171)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND FLOREX, ET AL., DEFENDANT-INTERVENORS

Court No. 87–05–00687

[Judgment for defendant.]

(Decided December 27, 1988)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon* and *Jimmie V. Reyna*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), Civil Division, United States Department or Justice, for defendant; (*Duane W. Layton*) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Duncan, Allen and Mitchell (*Leslie Alan Glick* and *John P. Williams*) for defendant-intervenors.

OPINION

RESTANI, *Judge:* Plaintiff Floral Trade Council of Davis (FTC) has moved for judgment on the agency record. It challenges the International Trade Administration's (ITA) final determination in *Certain Fresh Cut Flowers from Mexico*, 52 Fed. Reg. 6361 (1987). In particular, FTC, a trade association of domestic flower growers, challenges ITA's monthly averaging of United States Price data and ITA's failure to conduct a below cost of production investigation with regard to home market sales of the Mexican producer known as Floremor.

The court has found in a related case that averaging of United States price is appropriate for the simultaneous flower investigations initiated by petitioner FTC. ITA's reasoning is the same for both cases, as is the court's view of the ITA's determinations on this issue. For a full discussion of this issue *see Floral Trade Council* v. *United States*, Slip Op. 88–170, December 27, 1988 (review of ITA final determination as to fresh cut flowers from Ecuador).

FTC's other challenge is similar to one which was also made in the Ecuadorian case, to which the reader also should refer on this issue. FTC's basic argument is that ITA has an obligation to *sua*

sponte undertake below cost of production investigations whenever information in the record facially gives ITA reason to suspect such sales are occurring. 19 U.S.C. § 1677b(b) (1982) requires ITA to conduct such an investigation if it has "reasonable grounds to believe or suspect" sales are being made at less than the cost of production. The court's view is that whether ITA has reason to suspect below cost sales are being made relates not just to the data submitted to it but to the context in which that data exists. Thus, in *Floral Trade Council* v. *United States,* Slip Op. 88–144, October 24, 1988 (review of ITA final determination as to fresh cut flowers from Costa Rica), the court found ITA did not err in failing to conduct a below cost of sales investigation even though the numerical data in the record when properly adjusted and examined with this issue in mind, could have given ITA reason to suspect below cost sales. The court viewed petitioner's failure to raise the issue at all in the administrative proceedings, even after ITA had given notice that no below cost investigation would occur and petitioner had viewed the data and discussed it in detail, as good reason for ITA not to perform such an investigation. This case is distinguishable from the Costa Rican case because in the case at hand FTC did raise the issue at the administrative level.[1] It did so, not at the time of petition filing, but rather it raised the issue in its post-preliminary determination pre-hearing brief.

ITA asserts nonetheless that a below cost of sales investigation request filed, as this one was, thirty-one days in advance of the due date of the final determination is untimely. There seems to be little debate that thirty-one days is not a sufficient time. That ITA was able to extend the final date based on a series of requests by the foreign respondents does not significantly alter the time problem. In this case, ITA appears never to have been in a position to believe it had more than one month remaining for the investigation. There is no indication that ITA knew that the respondents would request four extensions of the final determination date.

There is also no indication in the record that ITA, assuming the request had been timely received, would have considered the particular information which surfaced during the investigation as actually sufficient to warrant a below cost investigation. The record does indicate that the relevant information was not specific to the concerned producers; it was that of another Mexican producer. Such information could have been compared with Floremor's prices, but this is the kind of information that is indirect enough so that ITA would not be required to *sua sponte* recognize that a below cost of investigation was necessary, particularly where a very active participant in the proceedings had yet to raise the below cost issue.

Nonetheless, as FTC has no duty to investigate, FTC's only error with regard to this issue was waiting more than two months after it

[1]The Costa Rican case also differs from both the Ecuadorian case and this case on another point. In the Costa Rican case the relevant data concerned the specific producer at issue. In the Ecuadorian case the data was not even country specific.

received the same indirect information which ITA had uncovered before it requested the below cost investigation. As indicated, the evidence giving rise to reason to suspect below cost sales was not so clear that ITA should have immediately leapt to the conclusion that the below cost investigation was necessary, in the absence of petitioner's request. The court concludes therefore, that ITA acted reasonably in not conducting the below cost of production investigation after it received petitioner's late request, and that under the circumstances of this case ITA did not err by failing to address this issue at an earlier date on its own. Accordingly, ITA's final determination is sustained.

(Slip Op. 88–172)

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Consolidated Court No. 87–04–00623

Before RESTANI, *Judge.*

[Judgment sustaining ITC determination on remand as to certain fresh cut flowers.]

(Dated December 27, 1988)

Heron, Burchette, Ruckert & Rothwell (*Thomas A. Rothwell, Jr., James M. Lyons* and *William E. Donnelly*), for Asociacion Colombiana de Exportadores de Flores and American Flower Corp. (*Joseph A. Vicario, Jr.* and *Alfred G. Scholle*), for Asociacion Colombiana de Exportadores de Flores.

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Jimmie V. Reyna*) for the Floral Trade Council of Davis, California.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel and (*Judith M. Czako*), United States International Trade Commission, for defendant United States.

Kaplan, Russin & Vecchi (*Kathleen F. Patterson* and *Dennis James, Jr.*) for The Government of Israel and Agrexco Agricultural Export Co.

Gustav Springer, for Bedrijfschap Voor de Groothandel, etc. and Vereniging Van Bloemenveiling, etc.

Prather, Seeger, Doolittle & Farmer (*Edwin H. Seeger*) for Flores Esmeralda, S.R.L.

Duncan, Allen and Talmage (*John P. Williams* and *Leslie A. Glick*), for The Government of Kenya.

OPINION

RESTANI, *Judge:* This case is before the court following the International Trade Commission's (ITC) remand determination in *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru,* Inv. Nos. 303–TA–18, 701–TA–275 through 278 and 731–TA–327 through 333 (August 1988) (Remand Determination). At this point in the proceedings, the only live issues involve negative threat determina-

tions concerning miniature carnations from various countries.[1] The background of this consolidated case, involving challenges to certain of ITC's affirmative and negative determinations in *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel and The Netherlands,* USITC Pub. 1956, Inv. Nos. 701–TA–275 through 278 and 731–TA–327 through 331 (March 1987) (*Flowers I*) and in *Certain Fresh Cut Flowers from Peru, Kenya and Mexico,* USITC Pub. 1968, Inv. Nos. 303–TA–18 and 731–TA–332, 333 (April 1987) (*Flowers II*), is set forth in *Asociacion Colombiana de Exportadores de Flores* v. *United States,* 12 CIT ——, Slip Op. 88–91 (July 14, 1988) (Asocolflores). In that opinion, the court remanded this matter for reexamination of the ITC's multiple domestic industry finding, also known as the like product determination, as well as for reexamination of the question of whether certain data should be analyzed on a cumulative basis for purposes of assessing threat of injury by reason of imports of miniature carnations from various countries. Following remand, the parties abandoned their objections to the finding of seven domestic flower industries, on the part of three commissioners, and of a single domestic flower industry, on the part of two commissioners.[2]

Thus, the only objection to the remand determination, which addressed both like product and cumulation, is the objection of Floral Trade Council of Davis (FTC), petitioner before ITC and a plaintiff and defendant intervenor here, to ITC's failure to cumulate for threat analysis purposes. FTC adheres to its earlier asserted claim of lack of substantial evidence supporting certain negative determinations regarding miniature carnations. These objections will be addressed separately.

I. Cumulative Analysis of Certain Data Regarding Threat of Injury by Reason of Unfairly Traded Miniature Carnations

As the court found in its earlier opinion herein, cumulative analysis of the volume and price effects of unfairly traded imports from all countries subject to investigation is not mandatory for threat of injury determination purposes. *See Asocolflores* at 16–17. Nonetheless, cumulative analysis may be applied in appropriate threat of injury investigations. It is error to fail to cumulate solely because of a general conclusion that any cumulation for threat analysis purposes is speculative. Such a view would, in effect, rule out cumulative analysis for threat purposes in all cases. Therefore, as the court held in its earlier opinion, ITC should consider whether cumulation

[1] Petitions were filed covering, *inter alia,* miniature carnations from Canada, The Netherlands, Kenya, Costa Rica, Ecuador, Israel, Peru, and Colombia. The entire commission rendered the equivalent of a negative determination with respect to miniature carnations from Canada, The Netherlands and Kenya. A majority of the Commission found threat of injury by reason of miniature carnations from Colombia. A different majority found no threat of injury by reason of such flowers from Costa Rica, Ecuador, Israel and Peru.

[2] ITC apparently misunderstood the court's opinion regarding lack of record support for a finding of a single domestic flower industry. The parties, however, have chosen to accept the split decision of ITC on this issue. Therefore, the court sees no reason to explain its original remand order on this issue or to further remand this matter regarding the like product issue. The court considers this issue settled as among the parties. The court also notes the non-participation of one commissioner in the remand proceeding. As indicated previously, remands are made to the ITC, not to the individual commissioners. Where possible all commissioners should participate in remand determinations. No challenge, however, is made on this basis.

would be appropriate under the facts of the particular case at hand. Implicitly, the court also required ITC to state the reason for its conclusion.

FTC states that on remand ITC did not follow the court's ruling, but rather applied a blanket rule under the guise of exercising discretion, and further that ITC applied an improper threshold for cumulation in the nature of an improper "contributing effects" test. *Cf. Fundicao Tupy S.A.* v. *United States,* 12 CIT ——, 678 F. Supp. 898, 901 (1988); *USX Corp.* v. *United States,* 12 CIT ——, 682 F. Supp. 60, 73 (1988) (both finding a test for cumulation which required each country's imports to have a causal link to material injury improper for material injury analysis).

As to the two negative opinions based on the existence of one all cut flower industry,[3] one commissioner found the single cut flower industry in good condition and not sufficiently weakened to be threatened with injury from any source. The other commissioner found enough of a possibility of threat by reason of imports from Colombia and The Netherlands to discuss the issue, but found no likelihood for significant change as to imports from those countries. Thus, together or separately, such imports would pose no threat of material injury to the currently uninjured industry. It is clear from the opinion that this commissioner also found the U.S. industry in such a healthy condition, and the effect of imports from other countries so negligible, that threat of injury would not be found based on either a cumulative or a non-cumulative analysis. Thus, cumulation seems to be, for the most part, irrelevant for purposes of the single flower industry opinions. Although FTC apparently disagrees with this approach, FTC does not challenge it in this action. Thus, the focus here is on the determinations of the three commissioners who found separate flower industries, and particularly on the one opinion of the three which found no threat of injury with regard to miniature carnations from Ecuador, Israel, Costa Rica, and Peru.

First, as a preliminary matter, the remand determination appears to assert that relevant ITC decisions involving discretion need not be explained. Remand Determination at 16–17. The court believes that such a statement is misleading. Many choices of ITC involve "discretionary" considerations, but the choices generally must be explained so that the reviewing court may discern the path of reasoning which led to the final outcome.[4] As the ITC apparently recognizes, it is also unwise not to explain hotly contested issues, as this will often result in remands for further explanation. That the

[3] Threat of material injury was found by ITC only with respect to miniature carnations from Colombia.

[4] In support of its apparent belief that it need not explain its reasons for not engaging in discretionary analysis, ITC cites *Hyundai Pipe Co.* v. *United States,* 11 CIT ——, 670 F. Supp. 357 (1987). Assuming *arguendo* that *Hyundai Pipe* stands for the proposition that ITC need not explain the type of choice made here in circumstances similar to these, the court does not concur with that view. *Hyundai,* however, might be read as standing for the proposition that the relevance of non-statutory factors for decision making vary from case to case and that all need not be discussed in every case. This is also in accord with the view expressed in cases dealing with statutory factors. *See, infra,* discussion of product shifting. The court finds the decision at hand is to be contrasted with the type of discretionary decision as to which there is no law to apply. Such decisions are essentially unreviewable. Such unreviewable decision-making is not at issue here.

administrative agency may make varying decisions based on the facts of particular cases does not permit the agency to act arbitrarily. In order to ascertain whether action is arbitrary, or otherwise not in accordance with law, reasons for the choices made among various potentially acceptable alternatives usually need to be explained. *See Bowman Transportation* v. *Arkansas-Best Freight System,* 419 U.S. 281, 285–286 (1974) (agency must articulate a rational connection between the facts found and the choice made). Whether a particular issue needs to be specifically addressed in these types of cases does not rest on whether the issue involves discretionary considerations; it rests on factors such as the importance of the issue to the outcome of the case, whether it is a serious issue, whether it was a focal point of the parties' arguments, and, generally, whether the final result may be sufficiently reviewed without specific discussion of the issue.

Second, after making the statement that obviously caused the court some concern, ITC did explain its reasoning in sufficient detail to permit review. Addressing FTC's basic challenges, the court finds no attempt by ITC to apply a blanket rule against cumulation for threat determination purposes. Although such a prohibition was implied in the first determination, it is clearly not the approach taken on remand. The court also finds no application of an improper contributing effects test, that is, ITC did not find that imports from each country must be causally linked to threat of material injury on an individual basis before cumulative analysis may be undertaken.

The court views cumulative analysis for threat purposes as feasible in certain circumstances. For example, if imports are increasing at similar rates in the same markets and have relatively similar margins of underselling, it is likely that cumulation could be undertaken. This does not mean that each country's imports need threaten injury by themselves. Separately, none of them might threaten injury. Whether cumulative analysis is actually feasible in various circumstances is left to ITC to decide in other cases. Here, ITC found great disparity in the patterns of volume increases and decreases among imports from the various countries. The court does not read ITC's references to Colombian market share versus that of other countries as indicating application of an improper contributing effects test. Colombian exports were simply on a totally different plane from those of other countries in terms of market share, volume trends and otherwise. Finally, ITC notes that patterns of underselling, or lack thereof, varied greatly from one country to the next. Thus, price effects analysis on a cumulative basis would be difficult. The court has previously noted, as did ITC in its remand de-

termination, the impossibility of cumulative analysis for purpose of certain statutory threat of injury indicators.[5]

FTC has not argued alternatively that the volume and price effects of imports from certain countries, comprising part of the entire pool of unfairly traded imports, could be cumulatively assessed, rather FTC argues for cumulation of all unfairly traded imports based on the same factors which mandate cumulation for actual injury determinations. The court rejects this view for the reasons stated in its original opinion. Accordingly, the court finds reasonable, and based on substantial evidence of record, ITC's determination not to cumulatively analyze volume and price effects for threat of injury purposes in this case.

II. ITC'S DETERMINATION OF NO THREAT OF INJURY BY REASON OF MINIATURE CARNATIONS FROM COSTA RICA, ECUADOR, ISRAEL OR PERU IS BASED ON SUBSTANTIAL EVIDENCE

As there is no challenge to the negative determinations which were based on one cut-flower industry, review focuses on the negative determination of the commissioner who analyzed miniature carnations as a separate industry. Each country's imports will be addressed separately, as they were by ITC.

A. Costa Rica

The relevant opinion regarding threat of injury by reason of miniature carnations from Costa Rica is found at pages 57–58 of the final determination in *Flowers I.* As to the Cost Rican imports, the commissioner noted the low market share held by Costa Rican miniature carnations. He also noted import prices were often above domestic prices and the downward trend of domestic prices versus fluctuating Costa Rican import prices. American Flower Corporation, a Costa Rican producer, noted the availability of other markets for Costa Rican imports.

FTC relies first on evidence of a surge in the market share held by Costa Rican imports and the fact that the commissioner drew opposite conclusions based on allegedly analogous information about Colombian imports.[6] Putting aside American Flower Corporation's challenge to the accuracy of United States Department of Agriculture information relied on by ITC as to Colombia, the commissioner made clear that his views on pricing and market share trend were made in the context of small absolute market share and volume. This certainly contrasts with the Colombian situation.

Second, FTC alleges that the commissioner failed to consider the statutory factor of the potential for product shifting. *See* 19 U.S.C. § 1677(7)(F)(i)(VIII) (Supp. IV 1986). Contrary to FTC's assertion, it

[5] The court notes that section 1330 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) provides that ITC may cumulate where practicable in threat cases if the basic conditions for cumulation for material injury investigations exist. This case is not governed by the 1988 Act, and the court does not reach the issue of whether the 1988 Act permits or requires cumulation in more, or fewer, circumstances than previously.

[6] As indicated, the relevant Colombian determination was affirmative.

is not always necessary to discuss every statutory injury or threat of injury factor. *See Gifford-Hill Cement Co.* v. *United States*, 9 CIT 357, 369–70, 615 F. Supp. 577, 587 (1985).[7] ITC, of course, must *consider* the statutory indicators of threat. 19 U.S.C. § 1677(7)(F)(i) (Supp. IV 1986); *Yuasa-General Battery Corp.* v. *United States*, 11 CIT ——, 661 F. Supp. 1214, 1222 (1987). There is no reason, however, to believe that the commissioner was blind to any evidence which might be relevant regarding product shifting, and did not consider this factor. Product shifting was discussed by the petitioner and by some of the commissioners, but the record does not indicate that product shifting should have been a determinative factor. Thus, it was not error to fail to mention this factor. For completeness sake, however, the court will discuss the evidence regarding this factor.

There are essentially two general assumptions which should be kept in mind regarding the potential for product shifting in this case. First, the existence of unfair trade orders may motivate product shifting for any industry. Second, as many agricultural products must be replanted periodically, product shifting is a possibility in many agricultural cases. These two general propositions do not by themselves mandate a conclusion that product shifting is likely. Why product shifting would be particularly attractive to the Costa Rican flower industry was not demonstrated. There is no information of record indicating Costa Rican imports could make a much larger miniature carnation market, so as to warrant abandonment of traditional production. Furthermore, one of the basic assumptions may not be applicable here. The pre-amended final dumping margin, which was before ITC, was less than one percent. *Certain Fresh Cut Flowers from Costa Rica*, 52 Fed. Reg. 6852 (Mar. 5, 1987) (Final Determination of Sales at Less Than Fair Value). Furthermore, the amended final determination resulted in no additional duties for other Costa Rican flowers. *Certain Fresh Cut Flowers from Costa Rica*, 52 Fed. Reg. 8493 (Mar. 18, 1987) (Amendment to Final Determination). While ITC may not have known of this result at the time of its determination, the court is, at least, concerned that a remand to consider this factor would be meaningless.

Accordingly, the court finds the commissioner's finding as to miniature carnations from Costa Rica supported by substantial evidence and in accordance with law.

B. Ecuador

The relevant opinion regarding Ecuadorian imports of miniature carnations is found at pages 58–59 of *Flowers I*. As to miniature carnations from Ecuador, the commissioner noted recent declines in market share, recent attention by Ecuadorian producers to non-U.S.

[7] *Yuasa-General Battery Corp.* v. *United States*, 11 CIT ——, 661 F. Supp. 1214 (1987) does not stand for a contrary position. It does stand for the position that if evidence of record seems to support a finding of satisfaction of a statutory factor, failure to discuss that factor may result in remand for further explanation.

markets, and low absolute volume. FTC did not point to specific indicators of threat by reason of Ecuadorian imports.

In regard to product shifting, see, *supra*, the general discussion concerning Costa Rica. The court also notes that final dumping margins for Ecuadorian imports ranged from three to nine percent except for one producer that received a higher rate based on best information available. *Certain Fresh Cut Flowers from Ecuador*, 52 Fed. Reg. 8494 (Mar. 18, 1987) (Amended Final Determination of Sales at Less Than Fair Value). That producer was heavily involved in miniature carnations, to the exclusion of standard carnations and chrysanthemums, *see* Confidential Record Document Number (CR) 25J, so that the opportunity for product shifting to miniature carnations seems to be largely missing. If the firms with lower margins had reason to shift production because of some particular factor, it was not made clear by FTC. The case for product shifting is not so strong that the commissioner's decision should be found to be unsupported or otherwise in error.

C. Israel

The pertinent decision with regard to Israeli miniature carnations is found at pages 59–60 of *Flowers I*. In his opinion, the commissioner recognized the relatively high volume of Israeli imports, but noted their somewhat stable market share. The commissioner also noted declining miniature carnation acreage in Israel and rising prices of Israeli imports, while U.S. prices were falling. Furthermore, the Government of Israel and Agrexco, an Israeli exporting concern, point to the timing of Israel's imports, specifically noting that miniature carnations from Israel enter the United States in winter and spring, the time of high demand and lower expectation of injury.

Product shifting does not appear to be an issue. Israel's other exports of concern were gerbera daisies. The determination as to gerberas was negative. The determination is, therefore, sustained as to Israel.

D. Peru

The relevant determination with regard to Peru is found at page 14 of *Flowers II*. The commissioner noted therein the declining market share for Peruvian miniature carnations imports from 1983 to 1985–86. He also observed that absolute share was low.

The court's earlier general comments on product shifting are applicable here. Flores Esmeralda which accounts for almost all imports from Peru had no positive antidumping margin; Peru received a negative antidumping determination overall. *Certain Fresh Cut Flowers from Peru*, 52 Fed. Reg. 7000 (Mar. 6, 1987) (Final Determination of Sales at Not Less Than Fair Value). Countervailing duties were imposed on pompon chrysanthemums, *Certain Fresh Cut Flowers from Peru*, 52 Fed. Reg. 13,491 (Apr. 23, 1987) (Amended Final

Countervailing Duty Determination), but the duties were relatively moderate and the acreage devoted to pompons is small in comparison to that already devoted to miniature carnations CR 25J.[8] Thus, there seems to be little potential for product shifting from pompons in Peru. In fact, FTC does not focus on a switch in Peruvian production because of duties on Peruvian imports. Rather, FTC posits a shift of production because of Flores Esmeralda's relation to Colombia. As indicated, certain Colombian producers received affirmative determinations as to threat to the miniature carnation industry. Flores Esmeralda operates in both Peru and Colombia. Flores Esmeralda's Colombian imports, however, were subjected to neither antidumping nor countervailing duties. Furthermore, as indicated, the record does not show a great deal of Peruvian acreage controlled by Flores Esmeralda which likely would be brought into miniature carnation production. In view of the factors noted, the commissioner's determination is found to be supported by substantial evidence.

For all of the foregoing reasons, ITC's remand determination is sustained in its entirety.

(Slip Op. 88–173)

UNITED STATES, PLAINTIFF *v.* THE PEERLESS INSURANCE CO., DEFENDANT

Court No. 87–10–01045

Before DICARLO, *Judge.*

Government's action to collect on an entry bond for an importer's failure to redeliver vehicles not in compliance with federal pollution control and safety standards is not beyond the six-year statute of limitations for contract actions. Because of possible factual defenses which the surety may raise in its answer, the government's motion for summary judgment is denied and the surety ordered to answer the complaint.

[Defendant's motion to dismiss and plaintiff's motion for summary judgment are denied.]

(Decided December 29, 1988)

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice, (*Barbara M. Epstein*) for plaintiff.

Doherty and Melahn (*William E. Melahn*) for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* The Peerless Insurance Company (Peerless) of New Hampshire moves under Rule 12(b)(5) of the Rules of this Court to dismiss an action for failure to state a claim upon which relief can be granted because the action brought on behalf of the

[8] Gypsophila occupies most of the acreage. The gypsophila industry was found to be uninjured and not threatened.

United States Customs Service (Customs) to recover liquidated damages for alleged violations of an entry bond is beyond the six-year statute of limitations under 28 U.S.C. § 2415(a) (Supp. IV 1986). In turn, the United States moves pursuant to Rule 56(a) of the Rules of this Court for summary judgment in the amount of $26,431 plus interest from the date of Customs' demand for payment.

The Court has jurisdiction under 28 U.S.C. § 1582(2) (1982). The Court finds that the government's action under paragraph (4) of the consumption entry bond is not barred by the statute of limitations and denies Peerless' motion to dismiss. The Court also finds the facts alleged in Peerless' supplemental petition and the anticipated defenses and justifications for discovery presented at oral argument provide a sufficient basis to conclude that disputes of material fact are unresolved. The government's motion for summary judgment is therefore denied.

BACKGROUND

Ferrari of San Francisco (Ferrari), as principal, and Peerless, as surety, executed an immediate delivery and consumption entry bond (customs Form 7553) in the amount of $75,000 to cover entries for the one year period from May 11, 1977 to May 10, 1978. Under the bond, Ferrari and Peerless are jointly and severally liable for all duties, taxes, and liquidated damages resulting from the entry of merchandise into the United States. Ferrari and Peerless are also jointly and severally liable for liquidated damages if merchandise imported under the bond is not timely redelivered to the custody of Customs following a proper demand on Ferrari.

Ferrari imported a used de Tomaso Pantera passenger automobile on August 10, 1977 and a new Ferrari passenger automobile on October 11, 1977. As conditions of importation, Ferrari executed forms stating that within ninety days the two vehicles would be brought into conformity with Environmental Protection Agency automobile emission standards and United States Department of Transportation motor vehicle safety standards.

Ferrari submitted Environmental Protection Agency Forms 3520–1, which declared that each "vehicle or engine is not in conformity with applicable emission standards, but will be brought into conformity with such standards and is *being imported under bond.*" Complaint, exhibits B and M (emphasis in original). Ferrari also submitted a Department of Transportation Form HS–7 that stated:

> The merchandise does not conform with applicable Federal Motor Vehicle Safety Standards, but I will bring it into conformity with such standards and will not sell or offer it for sale until the bond required by 19 C.F.R. [§] 12.80(c) has been released.
>
> WARNING: Entry under this provision requires posting of a bond equal to the value of the merchandise, for the delivery of a conformity statement no later than 90 days after entry to the

> District Director of Customs * * *. Vehicle *must be redelivered to port of entry* upon failure to provide satisfactory statement.

Complaint, exhibits C and N (emphasis in original).

Ferrari did not bring the vehicles into compliance, and on October 19, 1981, Customs mailed a notice to redeliver the vehicles to the port of entry. *See* 19 C.F.R. § 141.113(f) (1981). Ferrari did not redeliver the vehicles. On April 16, 1982, Customs demanded Ferrari pay liquidated damages of $6,180 for the used vehicle and $20,251 for the new vehicle. Customs sent copies of the demands for payment to Peerless.

Peerless then petitioned for mitigation relief from liquidated damages pursuant to 19 C.F.R. § 172.11. Customs denied this petition on September 17, 1982 and demanded full payment. Peerless then petitioned for supplemental relief under 19 C.F.R. § 172.33, asking Customs to cancel entirely all claims against Peerless because Customs' requests for redelivery and the notice of liquidated damages may not have been delivered to the "now defunct Ferrari" and that Customs did not act promptly in requesting redelivery. Complaint, exhibit I, at 1–3. Customs denied this petition and sent additional collection demands for payment of liquidated damages on October 1, 1984 and August 29, 1985. The government commenced this action on October 22, 1987.

DISCUSSION

Peerless moves to dismiss the action as barred by a six-year statute of limitations. The government contends the action is timely and moves for summary judgment in its favor.

A. Surety's motion to dismiss.

The parties agree that this action is governed by the six year statute of limitations in 28 U.S.C. § 2415(a) (Supp. IV 1986), which provides that an action brought by the United States for money damages founded upon a contract "shall be barred unless the complaint is filed within six years after the right of action accrues * * *." The parties disagree as to what event commenced the running of the statute.

Peerless argues that the statute of limitations "begins to run when the cause of action or breach of bond first accrues." *Defendant's Memorandum in Support of 12(b)(5) Motion,* at 5 (citing *United States* v. *Continental Seafoods, Inc.,* 11 CIT ——, 672 F. Supp. 1481, 1484 (1987), *remanded with instructions to dismiss with prejudice,* No. 88–1398 (Fed. Cir. Oct. 28, 1988); *United States* v. *Atkinson,* 6 CIT 257, 575 F. Supp. 791 (1983), *aff'd,* 3 Fed. Cir. (T) 15, 748 F.2d 659 (1984); and *United States* v. *Bavarian Motors,* 4 CIT 83 (1982)). Peerless maintains that "a claim under the bond accrues when the potential plaintiff is first able to maintain the cause of action in question, even though there may be other breaches subsequent to the first breach." *Defendant's Memorandum in Support of*

12(b)(5) Motion, at 5 (citing *Sven Salen AB* v. *Jacq. Pierot, Jr. & Sons, Inc.*, 559 F. Supp. 503, 505 (S.D.N.Y. 1983), *aff'd,* 738 F.2d 419 (2d Cir. 1984)).

Peerless contends the government was first able to maintain its cause of action upon the first default under paragraph 8 of the bond, which occurred on November 17, 1977, ninety-five days after the first vehicle was imported, and on January 17, 1978, ninety-five days after the second vehicle was imported. Peerless argues that Ferrari's failure to deliver within ninety days documents stating the vehicles had been brought into compliance with the pollution controls and safety standards constituted an automatic breach of paragraph 8. Peerless asserts that 19 C.F.R. § 12.73(b)(5)(x) and 19 C.F.R. § 12.80(b)(iii) are incorporated into the bond, *see Old Republic Ins. Co.*, v. *United States,* 10 CIT 589, 645 F. SUPP. 943 (1986), and that these regulations require that liquidated damages will issue if the documents are not timely submitted and the vehicles not timely redelivered. According to Peerless, this automatically triggers the statute of limitations as to paragraph 8. Peerless argues that this action is time-barred under the six year statute of limitations because it was not commenced until October 22, 1987.

Paragraph 8 of the bond provides for the delivery of certain papers:

> (8) And if in any case the above-bounden principal shall deliver to the district director of customs such invoices, declarations of owners or consignees, certificates of origin, certificates of exportation, and other documents as may be required by law or regulations in connection with the entry of said articles, and in the form and within the time required by law or regulations, or any lawful extension thereof, or in the event of failure to comply with any or all of the conditions of this section (8) shall pay to said district director such amounts as liquidated damages as may be demanded by him in accordance with the law and regulations, not exceeding the amount of this obligation, for breach or breaches thereof;

The government argues that determining whether paragraph 8 of the bond was breached is irrelevant, because the cause of action is based on the breach of paragraph 4 of the immediate consumption entry bond. Paragraph 4 provides for damages for failure to redeliver the non-conforming vehicles:

> (4) And if in any case the above-bounden principal shall redeliver or cause to be redelivered to the order of the district director of customs, on demand by him, in accordance with the law and regulations in effect on the date of the release of said articles, any and all of the merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States, * * * or, in default of redelivery *after a proper demand* on him, the above-bounden principal shall pay to the said district director such amounts as liquidated damages as may be demanded by him in accordance with the

> law and regulations, not exceeding the amount of this obligation, for any breach or breaches thereof;

(Emphasis added).

Paragraph 4 required Ferrari to redeliver the vehicles "after a proper demand" for redelivery. Customs made this demand for redelivery on October 19, 1981 under 19 C.F.R. § 141.113. Peerless argues that the government "incorrectly brought [this] action as a breach of paragraph 4 of the bond." Peerless characterizes this demand for redelivery as a mere formality which does not affect the start of the statute of limitations for an action under paragraph 8.

The government states its cause of action under paragraph 4 is proper and accrued when Ferrari failed to redeliver the vehicles on October 26, 1981, the sixth working day following the notices of redelivery. Using the government's date, the action to recover under paragraph 4 of the bond would not be barred by the six-year statute of limitations.

The conflict between paragraph 8 and paragraph 4 frames the issue of whether the six-year statute of limitations began to run ninety-five days after the failure to provide proper documents, or five days after Customs mailed the notices of redelivery.

In *United States* v. *Atkinson,* 6 CIT 257, 575 F. Supp. 791 (1983), *aff'd,* 3 Fed. Cir. (T) 15, 748 F.2d 659 (1984), the importer entered three automobiles into the United States under an Immediate Delivery and Consumption Entry Bond and made a statement maintaining that they conformed with applicable federal motor vehicle safety standards. The Office of Standards Enforcement notified Atkinson on February 28 and June 19, 1975 that his statement was not acceptable to the United States Department of Transportation. Customs mailed a notice of redelivery on December 14, 1976, ordering Atkinson to redeliver the automobiles within five days. When Atkinson did not redeliver the vehicles, the District Director of Customs mailed demands for liquidated damages. After several unsuccessful attempts to collect the liquidated damages, the government filed an action on the surety bond on December 17, 1982. The surety raised the six-year statute of limitations under 28 U.S.C. § 2415 as an affirmative defense.

Citing, among other cases, the district court opinion in *Sven Salem AB* v. *Jacq. Pierot, Jr. & Sons, Inc.,* 559 F. Supp. 503 (S.D.N.Y. 1983), the *Atkinson* court stated that "[i]t is a general rule that 'the statute of limitations begins to run on the date that a cause of action for breach accrues, which is ordinarily the time of the breach of the agreement.' " *Atkinson,* 6 CIT AT 260, 575 F. Supp. at 794. *Atkinson* did not expressly find that any deficiency in the importer's documentation triggered the statute of limitations, but rather that:

> When the defendants signed the bond in question, they entered into a contract with the government to redeliver the subject merchandise upon the request of Customs. *Defendants breached*

> *the bond agreement when they failed to so redeliver the merchandise to Customs.*

Id. (emphasis added). *Atkinson* did find that the statute of limitations commenced five days after the notice of redelivery was mailed:

> The cause of action against the defendants in this case accrued on December 19, 1976. The summons and complaint filed on December 17, 1982, accordingly, was within the six year limitation period provided by 28 U.S.C. § 2415.

Atkinson, 6 CIT at 260, 575 F. Supp. at 794.

Peerless' contention that it was the failure to provide proper documentation (plus five days) that triggered the statute of limitations, rather than the date when Customs mailed the notice to redeliver (plus five days), was thus apparently considered and rejected in *Atkinson.* A close reading of the *Atkinson* decision, however, fails to reveal that the importer predicated his statute of limitations defense upon a claim that the failure to file appropriate documents (a breach of paragraph 8) plus five days triggered the statute of limitations, rather than the date of Customs's demand for redelivery plus five days (paragraph 4).

The Court accordingly will independently examine the apparently conflicting bond paragraphs and the regulations which Peerless claims are incorporated into the bond.

In determining whether a statute or a regulation is incorporated into the terms of an import bond, the rule is that statutes and regulations which are designed to direct government officers in the performance of their duties for the government's own protection and security are construed as directory to the government officials only, and do neither create any obligation to the surety on the bond nor form any part of the contract. *Old Republic Ins. Co.* v. *United States,* 10 CIT 589, 600, 645 F. Supp. 943, 953 (1986); *United States* v. *De Visser,* 10 F. 642, 647 (S.D.N.Y. 1882). *See also United States* v. *Fulton Distillery, Inc.,* 571 F.2d 923, 928 (5th Cir. 1978); *American Casualty Co.* v. *Irvin,* 426 F.2d 647, 650 (5th Cir. 1970). The question, then, is whether 19 C.F.R. §§ 12.73(b)(5)(x) and 12.80(b)(1)(iii) create rights of the parties and if so, what result flows from a violation of those rights.

The Environmental Protection Agency (EPA) automobile emission standards identify requirements for entry and release of imported motor vehicles:

> Each motor vehicle or motor vehicle engine offered for importation or imported into the Customs territory of the United States shall be refused entry unless there is filed with the entry, in duplicate, a declaration verified by the importer or consignee which contains:
>
> * * * * * * *

> (5) A statement that:
>
> * * * * * * *
>
> (x) Such motor vehicle or motor vehicle engine is not covered by a certificate of conformity with Federal motor vehicle emission standards but will be brought into conformity with such standards and is being imported under bond in accordance with 40 [C.F.R. §] 85.1504.

19 C.F.R. § 12.73(b). If the declaration is not delivered to the district director of Customs at the port of entry of the vehicles within 90 days of entry or any allowed extensions of time, the importer or consignee "shall deliver or cause to be delivered to the district director of Customs those motor vehicles or motor vehicle engines which were released" under the import bond. 19 C.F.R. § 12.73(c). Customs will assess liquidated damages if the vehicle is not redelivered within 5 days following the 90 day period. 19 C.F.R. § 12.73(c).

The Department of Transportation motor vehicle safety standards provide that unless the EPA requirement is waived,

> each vehicle or equipment item offered for introduction into the Customs territory of the United States shall be denied entry unless the importer or consignee files with the entry a declaration, in duplicate, which declares or affirms * * *:
>
> * * * * * * *
>
> (iii) The vehicle or equipment item was not manufactured in conformity [with] all applicable safety standards, but it has been or will be brought into conformity. Within 120 days after entry, or within a period not to exceed 180 days after entry, if additional time is granted by the Administrator, National Highway Traffic Safety Administration ("Administrator, NHTSA"), the importer or consignee will submit a true and complete statement to the Administrator, NHTSA, identifying the manufacturer, contractor, or other person who has brought the vehicle or equipment item into conformity, describing the exact nature and extent of the work performed, and certifying that the vehicle or equipment item has been brought into conformity, and that the vehicle or equipment item will not be sold or offered for sale until the Administrator, NHTSA, issues an approval letter to the district director stating that the vehicle or equipment item described in the declaration has been brought into conformity with all applicable safety standards.

19 C.F.R. § 12.80(b)(1)(iii). If a declaration is filed under 19 C.F.R. § 12.80(b)(1)(iii), the vehicle may be released under an import bond:

> (1) If a declaration is filed under paragraph (b)(1)(iii) of this section, the entry shall be accepted only if the importer or consignee gives a bond on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter. An approval letter shall be issued upon approval by the Administrator, NHTSA, of the conformity statement submitted by the importer or consignee as provided for in paragraph (b)(1)(iii) of this section.

> The approval letter shall be forwarded by the Administrator, NHTSA, to the district director with a copy to the importer or consignee. Upon receipt of the approval letter the district director shall cancel the charge against the bond.
>
> (2) If the approval letter is not received by the district director within 180 days after entry, the district director shall issue a Notice of Redelivery, Customs Form 4647, requiring the redelivery to Customs custody of the vehicle or equipment item. If the vehicle or equipment item is not redelivered to Customs custody or exported under Customs supervision within the period allowed by the district director in the Notice of Redelivery, liquidated damages shall be assessed in the full amount of a bond if it is single entry bond or if a continuous bond is used, the amount that would have been taken under a single entry bond.

19 C.F.R. § 12.80(e).

An examination of these regulations shows that there is no right for the government to claim liquidated damages until there is a proper demand for redelivery. The regulations are designed to direct government officers in the performance of their duties and do not afford any additional rights to the surety. This contrasts to the regulations considered in *Old Republic Ins.*, 10 CIT at 600, 645 F. Supp. at 953, which provided that sureties must be given notice and must give their consent before Customs may extend the period of liquidation.

The Court finds that the government's action is not beyond the six-year statute of limitations for contract actions.

B. Government's motion for summary judgment.

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Converters Div. of Am. Hosp. Supply Corp.* v. *United States*, 861 F.2d 710, —— (Fed. Cir. 1988); *Atkinson*, 6 CIT at 258, 575 F. Supp. at 793, *aff'd*, 3 Fed. Cir. (T) 15, 748 F.2d 659 (1984). On a motion for summary judgment, the court must determine whether there are any factual disputes that are material to the resolution of the action. *See Heyman* v. *Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975); *United States* v. *F.H. Fenderson, Inc.*, 10 CIT 758, 760–62 (1986). The court may not resolve or try disputed issues of material fact on a motion for summary judgment. *Yamaha Int'l Corp.* v. *United States*, 3 CIT 108, 109 (1982). If there are any disputed issues of material fact, the government's motion for summary judgment must be denied.

Peerless claims that because it filed its motion to dismiss prior to its answer and prior to discovery, the government is without foundation for asserting that Peerless has no other defenses. The Court finds the facts alleged in Peerless' supplemental petition and the anticipated defenses and justifications for discovery presented at

oral argument provide a sufficient basis for finding that disputes of material fact are unresolved. The government's motion for summary judgment is denied.

CONCLUSION

Peerless' motion to dismiss is denied. The government's motion for summary judgment is denied. Peerless is granted 30 days in which to file its answer to the government's complaint.

(Slip Op. 88–174)

PPG INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI GLASS CO., LTD., CENTRAL GLASS CO., LTD., NIPPON SHEET GLASS CO., LTD., INTERVENOR-DEFENDANTS

Court No. 81–07–00986

MEMORANDUM AND ORDER

[Plaintiff's motion for judgment upon the agency record granted, in part; remanded to International Trade Administration.]

(Decided December 29, 1988)

Law Offices of Eugene L. Stewart (*Eugene L. Stewart, Terence P. Stewart* and *Jeffrey S. Beckington*) for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendant.

Tanaka Walders & Ritger (*H. William Tanaka, Lawrence R. Walders* and *Patrick F. O'Leary*) for the intervenor-defendants.

AQUILINO, *Judge:* In this action challenging a determination of the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Clear Plate and Float Glass from Japan; Final Results of Administrative Review and Revocation of Anti-dumping Finding*, 46 Fed.Reg. 32,926 (June 25, 1981), plaintiff's motion for judgment upon the agency record pursuant to CIT Rule 56.1 has been reassigned to the undersigned for decision.

That motion points to a finding by the Secretary of the Treasury under the Antidumping Act of 1921 that clear plate and float glass from Japan was being, or was likely to be, sold at less than fair value. *See Clear Plate and Float Glass from Japan*, 36 Fed.Reg. 9,009 (May 18, 1971). Thereafter, Treasury published a tentative determination to revoke the dumping finding. *See* 42 Fed.Reg. 9,740 (Feb. 17, 1977). The reasons given for this proposition were that the respondents had not sold their products at less than fair value for a period of two years from the date of the finding and that they had submitted written assurances that future sales of clear plate and

float glass to the United States would not be made at less than fair value.

The petitioner (plaintiff herein) thereupon requested a hearing with Treasury, at which it submitted data gathered and analyzed by a Japanese market-research firm and purporting to show dumping by the respondents during the periods reviewed by Treasury. In response to the submission, Treasury requested information about that firm in order to facilitate Customs Service verification. The petitioner was apparently unable to comply with the request, prompting Treasury to take the position that Customs could not proceed with an investigation. *See* Complaint, Exhibit L. No additional appraisement instructions were ever issued, however, nor did Treasury revoke the original order.

The Trade Agreements Act of 1979 became effective as of January 1, 1980, thereby transferring responsibility for administration of the antidumping law from Treasury to the ITA, which published notice of an administrative review of the original order, as required by the act, 19 U.S.C. § 1675(a)(1). The preliminary results of this review were:

> * * * All sales to the United States by Asahi Glass Co., Ltd., and Nippon Sheet Glass Co., Ltd. were made at not less than fair value from July 1, 1973 through February 17, 1977. All sales by Central Glass Co., Ltd. were made at not less than fair value from January 1, 1975 through February 17, 1977. There is no indication of sales at less than fair value by these three companies since that time.

Clear Plate and Float Glass from Japan; Preliminary Results of Administrative Review of Antidumping Finding and of Tentative Determination to Revoke, 46 Fed.Reg. 10,970, 10,971 (Feb. 5, 1981). This tentative determination to revoke also stated that, in compliance with 19 C.F.R. § 353.54(e), the three named firms had agreed in writing to an immediate suspension of liquidation and reinstatement of the antidumping-duty order if an indication of sales at less than fair value were to develop. Interested parties were offered an opportunity to be heard.

A disclosure conference was held with the petitioner, which challenged the ITA's use of weighted-average net-back prices for the period of review and its use of factory net-back methods for calculating home-market prices. The agency provided revised sample calculations, which still showed the absence of sales at less than fair value. The plaintiff took issue with them, questioning in particular the treatment of packing costs, inland freight, and sales-agent commissions.

In its published final results of the administrative review, the ITA acknowledged that it had recalculated its preliminary findings according to the comments offered by petitioner's counsel at the disclosure conference, but the agency nevertheless concluded that

sales at less than fair value were not made by Central Glass during the period January 1, 1975 to February 17, 1977, or by Asahi or Nippon during the period July 1, 1973 to February 17, 1977. Based on those results, the ITA revoked the antidumping-duty order on clear plate and float glass from Japan.

DISCUSSION

The plaintiff states in support if its motion for judgment on the agency record that

> the way in which the ITA conducted its first administrative review of the 1971 dumping determination * * * reveals a fundamental misreading * * * of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, and of section 751 of the Act especially. In terms of what periods of time and what entries of the subject merchandise must be scrutinized in its annual administrative review, whether its duty to investigate encompasses a requirement seriously to consider and verify information supplied by the United States domestic industry, and what constitutes a meaningful opportunity for the domestic industry to be heard and to participate actively in the review, the ITA would endow itself with an extensive discretion which in plaintiff's opinion Congress did not see fit to bestow upon the administering authority when it created section 751. To the contrary, section 751 in plaintiff's judgment demands a much more rigorous and extensive review than was made by the ITA and one in which plaintiff was entitled to and ought to have had a full hearing.[1]

Plaintiff's first argument focuses on the ITA's failure to examine all unliquidated entries of clear plate and float glass imported between the date of Treasury's tentative determination to revoke and the commencement of the section 751 review. In other words, the plaintiff contends that the ITA is bound both by 19 U.S.C. § 1675 and 19 C.F.R. §§ 353.53–.54 to review all shipments occurring after February 17, 1977 through the anniversary date of the initial order, May 18, 1980, when questionnaires were first distributed to the Japanese firms by the ITA. The plaintiff also alleges that the ITA disregarded section 353.54(a) by not determining the likelihood of a resumption of sales at less than fair value.

While contending that its choice of time periods is consistent with its discretionary authority and supported by substantial evidence, the defendant also opposes plaintiff's position on the grounds that it had not been raised first at the administrative level.

United States v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952), states that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." The Customs Courts Act of 1980 provides that, in an action such as this,

[1] Memorandum in Support of Plaintiff's Motion for Review of Administrative Determination Upon Agency Record, pp. 11–12.

"the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). This judicial discretion should not be exercised "where the obvious result would be a plain miscarriage of justice".[2] Indeed, the

> Court of International Trade has found exceptions to the exhaustion doctrine when requiring exhaustion would be futile or an insistence on a useless formality. *See, e.g., Rhone Poulenc, S.A.* v. *United States,* 7 CIT 133, 135, 583 F.Supp. 607, 610 (1984). The Court has also declined to require that plaintiffs pursue channels which could not lead to relief or pursue "manifestly inadequate" remedies. *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 201, 544 F.Supp. 883, 887, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982); *Luggage and Leather Goods Mfrs. of Am.* v. *United States,* 7 CIT 258, 266–67, 588 F.Supp. 1413, 1420–21 (1984). The "manifestly inadequate" standard is a limited one, however, because "mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *National Corn Growers Ass'n* v. *Baker,* 840 F.2d 1547, 1557 (Fed.Cir. 1988) (quoting *Miller & Co.* v. *United States,* 824 F.2d 961 (Fed.Cir. 1987), *cert. denied,* —— U.S. ——, 108 S.Ct. 773, 98 L.Ed.2d 859 (1988)).
>
> The Court of International Trade has also recognized an exception to the exhaustion doctrine where judicial interpretations of existing law are made after the contested administrative determination was published, and the new interpretation might have materially altered the agency result. *See Timken Co.* v. *United States,* 10 CIT ——, 630 F.Supp. 1327, 1334 (1986); *Rhone Poulenc, S.A.* v. *United States,* 7 CIT 133, 134–35, 583 F.Supp. 607, 609–10 (1984). The Court has also found it appropriate to consider claims not raised before the agency where Commerce did not adhere to controlling judicial precedents and where the plaintiff's arguments were based on facts available only in the confidential administrative record and the plaintiff was not timely informed of the deadline for access to the confidential record of business proprietary information.[3]

Here, such an exception exists. That is, *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed.Cir. 1985), and the *Timken* decision cited in the foregoing quotation represent a subsequent change in the law, the interpretation of which, if applied, might have materially altered the agency's results. *Hormel* v. *Helvering,* 312 U.S. 552, 558–59 (1941). In fact, *Freeport Minerals, Timken* and the instant action are similar. In each matter, Treasury had issued a tentative determination to revoke an antidumping-duty order, which did not become final before enactment of the Trade Agreements Act. Under that statute, the ITA assumed administrative responsibility from Treasury and conducted further review under section

[2] *Hormel* v. *Helvering,* 312 U.S. 552, 558 (1941).
[3] *Alhambra Foundry Co., Ltd.* v. *United States,* 12 CIT ——, ——, 685 F.Supp. 1252, 1256 (1988).

751. Like the situation here, the ITA in both *Freeport Minerals* and *Timken* focused its reviews on time periods which culminated on the dates of Treasury's original tentative determinations, leaving unreviewed years between Treasury's determinations and the ITA's first reviews. Of course, those years reflected the most current data. The Court of Appeals for the Federal Circuit in *Freeport Minerals* reviewed the statute, the regulations and the legislative history of the Trade Agreements Act and concluded that they required the ITA to use up-to-date information. The court held the ITA had abused its discretion by neglecting to review data as of the time of publication of its tentative determination to revoke. *See* 776 F.2d at 1034. The *Timken* court followed this decision. It rejected a contention that the period-of-review issue resolved by *Freeport Minerals* was improperly before the court because the plaintiff had failed to raise the issue at the administrative level, holding:

> * * * The interpretation of existing law set forth in *Freeport Minerals,* if applied in this action, could have a substantial impact upon the ITA's determination * * *. 10 CIT at 93, 630 F.Supp. at 1334.

Those two cases and others[4] indicate that, despite any failure to exhaust administrative remedies, remand to the agency is appropriate since determinations on the existence, or likelihood of resumption, of sales at less than fair value should be based on timely information.

CONCLUSION

In view of the foregoing, that part of plaintiff's motion for judgment upon the agency record which seeks to set aside the ITA's June 25, 1981 final results of its administrative review and revocation of the antidumping finding as to clear plate and float glass from Japan should be, and it hereby is, granted, and the matter is remanded to the ITA for further review in accordance with this memorandum and order.

In view of the time that has passed, however, the parties are to confer and propose to the court on or before January 31, 1989 a schedule for such further review.

SO ORDERED.

[4] *See, e.g., UST, Inc.* v. *United States,* 831 F.2d 1028, 1032 (Fed.Cir. 1987); *Matsushita Electric Industrial Co.* v. *United States,* 823 F.2d 505, 507 (Fed.Cir. 1987).

(Slip Op. 88–175)

PPG INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI GLASS CO., LTD., CENTRAL GLASS CO., LTD., NIPPON SHEET GLASS CO., LTD., INTERVENOR-DEFENDANTS

Court No. 82–05–00635

MEMORANDUM AND ORDER

[Plaintiff's motion for judgment upon the agency record granted, in part; remanded to International Trade Administration.]

(Decided December 29, 1988)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart and *David A. Hirsh)* for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis)* for the defendant.

Tanaka Walders & Ritger (H. William Tanaka, Lawrence R. Walders and *Patrick F. O'Leary)* for the intervenor-defendants.

AQUILINO, *Judge:* In this action challenging a determination of the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Clear Sheet Glass from Japan; Final Results of Administrative Review and Revocation of Antidumping Finding,* 47 Fed. Reg. 14,506 (April 5, 1982), plaintiff's motion for judgment upon the agency record pursuant to CIT Rule 56.1 has been reassigned to the undersigned for decision.

That motion points to a finding by the Secretary of the Treasury under the Antidumping Act of 1921 that clear sheet glass from Japan was being, or was likely to be, sold at less than fair value. *See Clear Sheet Glass from Japan,* 36 Fed. Reg. 9,010 (May 18, 1971). Thereafter, Treasury published a tentative determination to revoke the dumping finding. *See* 42 Fed. Reg. 8,740 (Feb. 11, 1977). The reasons given for this proposition were that the respondents had not sold their products at less than fair value for a period of two years from the date of the finding and that they had submitted written assurances that future sales of clear sheet glass to the United States would not be made at less than fair value.

The petitioner (plaintiff herein) thereupon requested a hearing with Treasury, at which it sought to dissuade the Secretary from revocation of his original finding. Before any action was taken one way or the other, the Trade Agreements Act of 1979 became effective, thereby transferring responsibility for administration of the antidumping law from Treasury to the ITA, which published notice of an administrative review of the original order, as required by the act, 19 U.S.C. § 1675(a)(1). The preliminary results of this review were:

> As a result of our comparison * * * of foreign market value, we preliminarily determine that only *de minimis* margins exist on some shipments from Central Glass Co., Ltd. and no margins

> exist for the other exporters. Therefore we determine that no dumping margine [*sic*] exist for the period January 1, 1975, through February 11, 1977.

Clear Sheet Glass from Japan; Administrative Review of Antidumping Finding and Tentative Determination to Revoke, 46 Fed. Reg. 33,064, 33,065 (June 26, 1981). This tentative determination to revoke also stated that, in compliance with 19 C.F.R. § 353.54(e), the three named firms had agreed in writing to an immediate suspension of liquidation and reinstatement of the antidumping-duty order if an indication of sales at less than fair value were to develop. Interested parties were offered an opportunity to be heard.

At the hearing, the petitioner took the position, among others, that the ITA was obligated to review the entire period from the date of the antidumping finding to the time of the latest available sales information to justify revocation. The agency disagreed, stating:

> The Treasury * * * reviewed all periods from the date of the finding through December 31, 1974, and the Department does not intend to reevaluate these results. The Department's present review of the January 1, 1975 through February 11, 1977 period fulfills the legal requirements for revocation.
>
> Further, the Department believes that section 353.54(a) of the Commerce Regulations gives the Secretary sufficiently broad discretion to determine whether to revoke an antidumping finding. Section 353.54(b), which requires that two years of no sales at less than fair value be demonstrated, does not require that the two year period immediately precede publication of the notice of proposed revocation. Finally the Department is satisfied that there is no present likelihood [*sic*] of resumption of less than fair value sales.[1]

This response of the ITA thus gives rise to the same issue just decided by this court in *PPG Industries, Inc.* v. *United States*, 12 CIT——, Slip Op. 88–174 (Dec. 29, 1988), namely, whether it was an abuse of discretion not to review data as of the time of the determination to revoke. *Freeport Minerals Co.* v. *United States*, 776 F.2d 1029 (Fed. Cir. 1985), and other, later decisions have held that it is. Hence, as was the case in slip op. 88–174, that part of plaintiff's motion for judgment upon the agency record which seeks to set aside the ITA's April 5, 1982 final results of its administrative review and revocation of the antidumping finding as to clear sheet glass from Japan should be, and it hereby is, granted, and the matter is remanded to the ITA[2] for further review in accordance with the law discussed therein.

[1] 47 Fed. Reg. 14,506. The ITA also rejected petitioner's other points and issued its revocation cited above, pages 1–2, which is the basis of this action.

[2] The court notes in passing that the defendant itself in this action takes the position that remand is called for, albeit on the other points raised by the plaintiff. *See generally* Defendant's Partial Opposition to Plaintiff's Motion for Review of Administrative Determination upon Agency Record and Request for a Remand of the Case; and the accompanying memorandum of law.

In view of the time that has passed, however, the parties are to confer and propose to the court on or before January 31, 1989 a schedule for such further review.

SO ORDERED.

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